51

~~484a~~
490a

(20)

No. 06-593

FILED
MAR 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER *
25 E. Washington St.
Suite 1400
Chicago, IL 60602
(312) 236-4584

Counsel for Respondent

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. THIS COURT SHOULD AFFIRM WITHOUT DECIDING WHETHER THE THIRD-PARTY REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE 5

A. The Third-Party Regulation Is Inconsistent With Congressional Intent To Exempt Only Companions Employed Directly By Private Households 5

1. The Amendments' Language Clearly Expresses Congressional Intent To Exempt Only Companions Employed Directly By Private Households 5

2. The Legislative Context Of The 1974 Amendments Confirms Congressional Intent To Exempt Only Companions Employed Directly By Private Households 10

B. The Third-Party Regulation Is Contrary To 29 C.F.R. § 552.3 Which Defines The Term "Domestic Service Employment" In The Exemption And Is Therefore Entitled To Greater Deference 24

II. THE THIRD-PARTY REGULATION IS NOT ENTITLED TO *CHEVRON* DEFERENCE 34

A. DOL Did Not Exercise Its Delegated Law-Making Authority In Promulgating The Third-Party Regulation 34

B. Notice and Comment Is Not Determinative 44

C. The Notice and Comment Procedure Was Defective 45

III. GRANTED THE DEFERENCE IT IS DUE UNDER *SKIDMORE*, THE THIRD PARTY REGULATION SHOULD NOT BE FOLLOWED 47

A. The Regulation Is Inconsistent With That Governing The Paired Exemption Of Babysitters 48

B. DOL Has Twice Persuasively Explained Why Companions Employed By Third-Party Firms Are Not Exempt 49

C. The Third-Party Regulation Is Inconsistent With The Required Narrow Construction Of FLSA Exemptions 50

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) 50
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) 27-28, 35
A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) 50
Auer v. Robbins, 519 U.S. 452 (1997) 28, 40, 43
Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995) 40
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 9
Barnhart v. Walton, 535 U.S. 212 (2002) 13, 44
Batterton v. Francis, 432 U.S. 416 (1977) 28, 48
Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988) 25, 37
Brennan v. Veterans Cleaning Service, Inc., 482 F.2d 1362 (5th Cir. 1973) 12
Brown v. Gardner, 513 U.S. 115 (1994) 24, 50
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) ..... passim
Christensen v. Harris County, 529 U.S. 576 (2000) 32, 37-38
Chrysler Corp. v. Brown, 441 U.S. 281 (1979) ... 41, 44, 45
Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) ... 39
Environmental Integrity Project v. EPA, 425 F.3d 992 (D.C.Cir. 2005) 45
Fanelli v. United States Gypsum Co. , 141 F.2d 216 (2d Cir. 1944) 27, 36
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 50
Futrell v. The Columbia Club, Inc., 338 F.Supp. 566 (S.D.Ind. 1971) 36
General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004) 5
Goldberg v. Sorvas, 294 F.2d 841 (3d Cir. 1961) 36
Goldberg v. Sullivan, 208 F.Supp. 266 (M.D.Ga. 1962) .. 36

Gonzales v. Oregon, 546 U.S. 243 (2006) 32
Helliwell v. Haberman, 140 F.2d 833 (2d Cir. 1944) 36
Homemakers Home and Health Care Services, Inc. v. Carden, 1974 U.S.Dist.LEXIS 9150 (M.D.Tenn. April 4, 1974), *aff'd*, 538 F.2d 98 (6th Cir. 1976) 12
Household Credit Services, Inc. v. Pfennig, 541 U.S. 232 (2004) 45
Knight v. Mantel, 135 F.2d 514 (8th Cir. 1943) 36
Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 10
Levesque v. Block, 723 F.2d 175 (1st Cir. 1983) 42
Lo Duca v. United States, 93 F.3d 1100 (2d Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996) 45
Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946) 28, 36
Market Co. v. Hoffman, 101 U.S. 112 (1879) 9
Morton v. Ruiz, 415 U.S. 199 (1974) 48
Motor Vehicle Ass'n v. State Farm Mut., 463 U.S. 29 (1983). 47
National Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986) 45
National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 45
NLRB v. Drivers Local Union No. 639, 362 U.S. 274 (1960) 8
North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) . 14, 24
PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 10
Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) 13
Ratzlaf v. United States, 510 U.S. 135 (1994) 9
Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir. 1994) . 39
Reich v. Newspapers of New England, 44 F.3d 1060 (1st Cir. 1995) 39
Reich v. New York, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994) 39
Shaw v. Prentice Hall Computer Publ'g, Inc., 151 F.3d 640 (7th Cir. 1998) 39

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 4, 27, 35-36, 48
Stutson v. United States, 516 U.S. 163 (1996)) 43
Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 32
Thornburg v. Gingles, 478 U.S. 30 (1986) 21
Tiger v. Western Investment Co., 221 U.S. 286 (1911) 8
TRW Inc. v. Andrews, 534 U.S. 19 (2001) 9
United States v. Haggar Apparel Co., 526 U.S. 380 (1999) 44
United States v. Mead Corp., 533 U.S. 218(2001) ... passim
United States v. Nordic Village, Inc., 503 U.S. 30 (1992) . 9
Walling v. Yeakley, 140 F.2d 830 (10th Cir. 1944) 36
Wessling v. Carroll Gas Co., 266 F.Supp. 795 (N.D.Ia. 1967) 36
Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 (5th Cir. 1969) 36
Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Statutes and Congressional Material

5 U.S.C. § 553(b)(3)(A) 36
5 U.S.C. § 553(d)(2) 36
26 U.S.C. § 3121(a)(7) 31
26 U.S.C. § 3121(b)(2) 31
26 U.S.C. §3121(x) 20
26 U.S.C. § 3510 ..... 7, 8
26 U.S.C. § 3510(c)(1) 7
29 U.S.C. § 202(a) 17
29 U.S.C. § 203(r) 11
29 U.S.C. § 203(s) 11
29 U.S.C. § 203(s)(1) (1974) 12
29 U.S.C. § 206(a) 11
29 U.S.C. § 206(f) 1, 31
29 U.S.C. § 206(f)(1) 6, 19, 20

29 U.S.C. § 207(a) (1) 11
29 U.S.C. § 207(l) 1, 6, 31
29 U.S.C. § 213(a)(1) 39
29 U.S.C. § 213(a)(15) ..... passim
29 U.S.C. § 259(a) 37
42 U.S.C. § 409(a)(6)(A) 20, 31
42 U.S.C. § 409(a)(6)(B) 20, 31
42 U.S.C. § 409(c) 20
42 U.S.C. § 410(a)(2) 31
42 U.S.C. § 1320b-7(a)(3) 8

Pub.Law 93-259, §7, 88 Stat. 62 (1974) 17
Pub. Law 93-259, § 29(b), 88 Stat. 76 (1974) 28

S. 2747, 93d Cong., 1st Sess. Amdt. No. 990
(March 1, 1974) 15
S. 2747, 93d Cong., 1st Sess., Amdt. 989
(March 1, 1974) 15
S. 2747, 93d Cong., 1st Sess., Amdt. No. 981
(Feb. 28, 1974) 15
S. 2727, 93d Cong., 1st Sess. (Nov. 19, 1973) 15
S. 1725, 93d Cong., 1st Sess. (May 7, 1973) 15

S. Rep. No. 93-690, 93d Cong., 2d Sess.
(Feb. 22, 1974) 12, 13, 19
S. Rep. No. 93-358, 93d Cong., 1st Sess.
(July 28, 1973) 21, 24
S. Rep. No. 93-300, 93d Cong., 1st Sess.
(July 6, 1973) 12, 13, 14, 15, 16, 17, 19, 22
S. Rep. No. 81-1669, 81st Cong., 2d Sess.
(May 17, 1950) 19
H.R. Rep. No. 93-913, 93d Cong., 2d Sess.
(March 15, 1974). 13, 19, 20
H.R. Rep. No. 93-232, 93d Cong., 1st Sess.
(May 29, 1973) 13, 16, 18, 19

120 Cong. Rec. (1974) 13
119 Cong. Rec. (1973) ..... passim
118 Cong. Rec. (1972) 22

Regulations and Regulatory Material

20 C.F.R. § 404.1014 31
20 C.F.R. § 404.1027(j) (1974) 25
20 C.F.R. § 404.1057(a) 31
26 C.F.R. § 31.3121(a) (7)-1(a)(2) 31
26 C.F.R. § 31.3121(b)(2)-1(a) 31
29 C.F.R. Part 541 (2004) 39
29 C.F.R. § 541.0 39
29 C.F.R. § 541.118(a) (1996) 40
29 C.F.R. § 541.1(f) (1996) 40
29 C.F.R. § 541.2(e) (1996) 40
29 C.F.R. § 541.3(e) (1996) 40
29 C.F.R. Part 552 38
29 C.F.R. § 552.2(c) 4, 26, 28, 29,38, 41, 45
29 C.F.R. § 552.3 ..... passim
29 C.F.R. § 552.4 30
29 C.F.R. § 552.5 30
29 C.F.R. § 552.6 30
29 C.F.R. § 552.7 38
29 C.F.R. § 552.100(b) 38
29 C.F.R. § 552.100(c) 38
29 C.F.R. § 552.100(d) 38
29 C.F.R. § 552.101(a) 4, 25, 32
29 C.F.R. § 552.104 49
29 C.F.R. § 552.104(a) 38
29 C.F.R. § 552.105(a) 38
29 C.F.R. § 552.108 38
29 C.F.R. § 552.109(a) ..... passim
29 C.F.R. § 552.109(b) 48, 49
29 C.F.R. § 775.1 44
29 C.F.R. Part 790 37

29 C.F.R. § 790.1(c). 37
29 C.F.R. § 790.17(c) 37

14 Fed. Reg. 7705 (1949) 39
14 Fed. Reg. 7730 (1949) 39
19 Fed. Reg. 1321 (1954) 40
19 Fed. Reg. 4405 (1954) 40
28 Fed. Reg. 7002 (1963) 40
29 Fed. Reg. 9505 (1963) 40
39 Fed. Reg. 35382 (1974) ..... passim
40 Fed. Reg. 7404 (1975) 22, 25, 41, 46, 47
58 Fed. Reg. 69311 (1993) 33-34
60 Fed. Reg. 46797 (1995) 33
66 Fed. Reg. 5485 (2001) 25, 49
67 Fed. Reg. 16668 (2002) 49
68 Fed. Reg. 15563 (2003) 39

Department of Labor, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Economic Effects Study Submitted to Congress 1973* 12
Department of Labor, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Economic Effects Study Submitted to Congress 1974* 12

Social Security Administration, Social Security Handbook 31

2002 DOLWH LEXIS 11 (Aug. 16, 2002) 34
1999 DOLWH LEXIS 73 (June 18, 1999) 33
1999 DOLWH LEXIS 59 (May 20, 1999) 33
1999 DOLWH LEXIS 23 (Feb. 26, 1999) 33
1999 DOLWH LEXIS 1 (Jan. 6, 1999) 33
1998 DOLWH LEXIS 75 (Aug. 28, 1998) 33
1998 DOLWH LEXIS 71 (Aug. 11, 1998) 33
1994 DOLWH LEXIS 97 (Nov. 30, 1994) 33
1986 DOLWH LEXIS 105 (Aug. 12, 1986) 33
1972 DOLWH LEXIS 19 (Aug. 20, 1972) 12

Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971) 12
Wage and Hour Division, Field Operations Handbook § 11d00(c) (1994). 33

Other

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 384 (1985) 41, 42, 44
Attorney General's 1947 *Manual on the Administrative Procedure Act* 37
Auer v. Robbins, Brief for Petitioners, 1996 U.S.S.Ct. Briefs LEXIS 544 40
Auer v. Robbins, Brief for Respondents, 1996 U.S.S.Ct. Briefs LEXIS 632 40
Auer v. Robbins, Brief for the United States, 1996 U.S.S.Ct. Briefs LEXIS 647 40
Ballantine's Law Dictionary (1969) 7
Black's Law Dictionary (4th ed. 1968) 6, 7
Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986) ....., 26
Merrill & Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) 26
Merrill & Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) . 28
Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989) 26
Webster's New Twentieth Century Dictionary of the English Language (2d ed. 1969) 7

SUMMARY OF THE ARGUMENT

I. This Court should affirm the decision of the Second Circuit without reaching the first question concerning *Chevron* deference because 29 C.F.R. § 552.109(a) (the "third-party regulation") is contrary to the language in the "companionship exemption" to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15), contrary to congressional intent, and contrary to a Department of Labor ("DOL") regulation, 29 C.F.R. § 552.3, entitled to greater deference. The Second Circuit's construction of the companionship exemption not to strip employees of third-party business firms of the Act's minimum wage and overtime protections is the only one that (1) gives meaning to all the words in the statutory exemption; (2) is consistent with congressional intent in the 1974 FLSA amendments to expand and in no way to contract the coverage of the FLSA as well as to accommodate the special needs of private household employers who were the exclusive focus of congressional debate; and (3) is consistent with DOL's own definition in § 552.3 of the term "domestic service employment" as used exclusively in the statutory exemption – a definition promulgated pursuant to the express congressional delegation of authority to "define[] and delimit[]" the terms of the exemption.

A. The companionship exemption encompasses only employees who are "employed in domestic service employment to provide companionship . . . .," 29 U.S.C. § 215(a)(13), and this language encompasses only companions employed directly by private household employers. The 1974 amendments extended the Act to all employees "employed in domestic service," but exempted only employees "employed in domestic service *employment*" to provide babysitting or companionship services. 29 U.S.C. §§ 206(f), 207(l), 213(a)(15) (emphasis added). There is a material distinction between the terms "domestic service" and "domestic service employment" – a distinction wholly overlooked by Petitioners. The former term is broader, encompassing domestic work performed in a household irrespective of the identity of the employer while the latter term is narrower, additionally requiring an employment

relationship between the domestic employee and the private household. The third-party regulation ignores the significance of the word "employment" as distinct from the word "service," rendering the word "employment" superfluous. In order to avoid this redundancy, the word "employment" must be given its primary dictionary definition, referring to an employment relationship – thus, the phrase "domestic service employment" means employment by the household. This is precisely the definition provided by DOL in § 552.3 – "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." This construction is consistent with subsequent congressional use of the same phrase in the closely related Social Security Act. It avoids the result, clearly not intended by Congress, of exempting companions who were already protected by the FLSA prior to the 1974 extension of coverage because they were employed by covered enterprises. Finally, it does not create the gap in coverage suggested by Petitioners.

The legislative context in which Congress adopted the companionship exemption also illuminates its meaning, confirming congressional intent to exempt only companions employed directly by private households. First, for over a decade prior to the amendments, the FLSA covered companions and other domestics employed by third-party firms qualifying as enterprises engaged in commerce. And, notably, throughout congressional discussions of the amendments the Committees and individual members of Congress repeatedly stated that they intended to expand the FLSA's coverage of domestics; nowhere did they express any intent to contract existing coverage. In other words, Congress did not intend the limitation on the extension of coverage of domestics to exceed the scope of the extension. Second, the only concerns expressed in Congress about the extension of the Act's coverage of domestics related exclusively to domestics employed directly by private households. Third, in response to these express concerns for private household employers, Congress created a limited set of

special provisions applicable only to employees employed by households, including the companionship exemption, as it had earlier done in the Social Security Act. Indeed, the Committees and members of Congress cited the Social Security Act as a model, incorporating one of its accommodations of household employers by reference into the amended FLSA. Finally, the Senate, House, and Conference Committee Reports all explained that household employers could be accommodated through the companionship exemption (and the paired exemption of babysitters) because Congress did not expect provision of companionship (or babysitting) to be a regular source of support for companions employed by households.

B. Whatever degree of deference is due the third-party regulation, greater deference is due § 552.3, which DOL expressly adopted pursuant to its delegated law-making function – to "define[] and delimit[]" the terms of the companionship exemption. Congress intended that the regulations containing these definitions and actually specifying the details of the legislation would have the "force of law." Thus, § 552.3 is entitled to greater deference than the third-party regulation promulgated pursuant to the general grant of rule-making authority in the amendments. Consistent with both the language of the exemption and the legislative context, § 552.3 provides, "As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." DOL's effort to reconcile the two regulations impermissibly ignores the unambiguous § 552.3 requirement of employment by the private household – the words "home . . . of the person by whom he or she is employed" – and is furthermore inconsistent with DOL's contemporaneous intent in promulgating and subsequent construction of § 552.3.

II. The Second Circuit properly declined to accord the third-party regulation deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), pursuant to the second prong of the test established in *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001). The Second Circuit was correct because DOL expressly and intentionally did not adopt the regulation pursuant to its delegated authority to adopt rules "carrying the force of law." To the contrary, DOL stated in its regulations, 29 C.F.R. § 552.2(c), as well as in the notice of proposed rule-making, 39 Fed. Reg. 35382 (1974), that the third-party regulation was not among those that "defined and delimited" the statutory terms but rather was a "statement of policy and interpretation." At the time it promulgated and so classified the regulation, DOL certainly knew fully the implications of such classification for judicial deference. DOL's attempt retroactively to reclassify the regulation should be accorded little weight in relation to the express, contemporaneous classification and is unpersuasive.

According the third-party regulation the deference it is due under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit properly declined to follow the regulation because (1) the regulation is inconsistent with the exemption's text; (2) the regulation is inconsistent with congressional intent; (3) the regulation is inconsistent with DOL's own § 552.3 definition of "domestic service employment" and its reiteration in 29 C.F.R. § 552.101(a); (4) the regulation is inconsistent with the regulation governing babysitters whom Congress paired with companions in the exemption; (5) the regulation has been twice recognized by DOL as inconsistent with congressional intent (when DOL proposed the original 1974 regulation and a revised regulation in 2001) and on neither occasion did DOL repudiate or in any way undermine its own finding of inconsistency; and (6) the regulation is inconsistent with this Court's mandate that DOL narrowly construe the FLSA's exemptions.

ARGUMENT

I. THIS COURT SHOULD AFFIRM WITHOUT DECIDING WHETHER THE THIRD-PARTY REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

A. The Third-Party Regulation Is Inconsistent With Congressional Intent To Exempt Only Companions Employed Directly By Private Households

In this case, there is "no need to choose between *Skidmore* and *Chevron* . . . because the [agency] is clearly wrong." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004). "[R]egular interpretive methods leave no serious question" concerning congressional intent not to exempt companions employed by third-party firms. *Id.*

1. *The Amendments' Language Clearly Expresses Congressional Intent To Exempt Only Companions Employed Directly By Private Households*

The question of whether Congress intended the term "employed in domestic service employment to provide companionship services" to encompass companions employed by third-party firms must be answered first by examining the precise language of the 1974 amendments to the FLSA. The statutory language carving out the limitation on the extension of FLSA coverage of domestics wrought by the amendments makes clear congressional intent to exclude only babysitters and companions employed by private households.

Contrary to the assertions of Petitioners and the Solicitor General, the language in the exemption is *not* the same as the language inserted into §§ 6 and 7 of the Act extending coverage of domestics. There is a critical difference: the word "employment." The term "employment" is a qualifying and restricting term. The extension provisions broadly reach all "domestic service," but the exemption applies to only "domestic service employment." In the amended § 206, the

minimum wage requirement was extended to reach "Any employee – (1) who in any workweek is employed in *domestic service* in a household . . . ." 29 U.S.C. § 206(f)(1) (emphasis added). Similarly, the amended § 207 extended the maximum hour rule to provide, "No employer shall employ any employee in *domestic service* in one or more households . . . ." 29 U.S.C. § 207(l) (emphasis added). That language was intended to remove any doubt about whether the Act covered all employees performing any type of domestic service. In contrast, however, the exemption applies to only "any employee employed in *domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added).

If Congress had intended to exempt all employees providing companionship services in private households it would have reiterated the very same language it used to extend the Act's coverage and broadly exempted "any employee employed in domestic service to provide companionship services." Instead, Congress inserted the additional word "employment." The difference is material. Through the cumbersome phrase "any employee employed in domestic service employment," Congress qualified "service" with the additional, restrictive term "employment" and thus Congress limited the scope of the exemption based not only on the *type* of services performed by the employee (because that is specified by the words "domestic service" and "companionship services") and not only on the *location* of the services (because that would have been done by using the phrase "in a household" as in §§ 206 and 207), but rather based specifically on the *relationship of "employment."*

The meaning Congress ascribed to the qualifying word "employment" in the exemption is elucidated by influential dictionary definitions available to members of Congress in 1974. "Employment" means "[t]he act of hiring," according to *Black's Law Dictionary* 618 (4th ed. 1968), "implying a request and a contract for compensation." Thus "employment" means a direct business *relationship* between two or more parties, as

necessarily entailed in the act of "*hiring*" and the privity intrinsic to a "*contract for compensation*" rather than the work done. In *Ballantine's Law Dictionary* 400, 1164 (1969), the primary definition of "employment" is "[t]he act of employing or being employed;" in contrast, the primary definition of "service" is "[w]ork performed."[1] Similarly, *Websters' New Twentieth Century Dictionary of the English Language* 595, 1658 (2d ed. 1969) defines "employment" primarily as "the act of employing or the state of being employed," whereas "service" means "the occupation or condition of a servant." The qualifying language of the exemption, therefore, requires a specific "*employment*" relationship – an employment relationship between domestics and private households. Only giving this meaning to the phrase "domestic service employment" saves the word "employment" from being redundant with "service" and thus superfluous. "[D]omestic service employment" means precisely what DOL itself has defined it to mean in § 552.3 – not simply domestic service in a private home, but domestic service in a private home performed by an employee *employed by* the household.

Twice since 1974, Congress has again used the phrase "domestic service employment" in the closely related Social Security Act and each time the phrase encompasses only the direct employment relationship between private households and their domestic employees. In 1994, Congress amended the Social Security Act to coordinate "collection of *domestic service employment* taxes." 26 U.S.C. § 3510 (Social Security Domestic Employment Reform Act of 1994, P.L. 103-387, § 2(b)(1), 108 Stat. 4073 (Oct. 22, 1994)) (emphasis added). Congress defined "domestic service employment taxes" to mean "taxes . . . on remuneration paid for domestic service in a *private home of the employer*." 26 U.S.C. § 3510(c)(1) (emphasis added). Again in 1999, Congress clarified the wage reporting requirements "with respect to *domestic service*

[1] *Black's* offers no primary definition of "Service" but splinters the entry under headings of "Feudal Law," "Domestic Relations," "Contracts," etc. *Id.* at 1533.

employment." 42 U.S.C. § 1320b-7(a)(3) (Pub. L. 106-170, Title IV, § 405, 113 Stat. 1911 (Dec. 17, 1999)) (emphasis added). Congress specified the meaning of the term by reference to 26 U.S.C. § 3510 quoted above. Thus, Congress has twice since 1974 expressly stipulated that "domestic service employment" means the direct employment relationship between private households and their domestic employees.

This use of exactly the same phrase to refer to the relationship between private households and their domestic employees in the closely related Social Security Act is highly relevant to this Court's construction of the phrase in the FLSA. Considering similarly linked statutes in *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 291 (1960), this Court looked to provisions of the subsequently enacted Labor Management Reporting and Disclosure Act of 1959 to interpret earlier provisions of the Taft-Hartley Act of 1947 in rejecting the National Labor Relations Board's construction of Taft-Hartley:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result . . . mindful of the manifest purpose of the Congress to fashion a coherent national labor policy.

See also Tiger v. Western Investment Co., 221 U.S. 286, 309 (1911) ("When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.")

Thus, the unique word "employment" in the exemption and the cumbersome phrase "employed in domestic service *employment*" must be construed to refer to a direct employment

relationship between private households and their domestic employees. Otherwise, "employment" would be synonymous with "service" and therefore superfluous. This Court has held that it is "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). "[A] statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Statutory construction must avoid treating any words in a statute "essentially as surplusage – as words of no consequence." *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994). That, however, is exactly what Petitioners propose and the third-party regulation effects. But this Court is "not at liberty to construe any statute so as to deny effect to any part of its language." *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879).

The injunction against rendering words in a statute superfluous is at its strongest here precisely because the exemption language of § 213(a)(15) contrasts with the extension language of §§ 206 and 207. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). "'We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.'" *Id.* at 454 (quoting *Russello*, 464 U.S. at 23).

Construing "domestic service employment" to mean a direct employment relationship between private households and their domestic employees avoids the result clearly unintended by Congress of eliminating coverage of companions employed by enterprises engaged in commerce who were already covered

prior to the amendments' adoption. Moreover, because the phrase "employed in domestic service employment" appears only in the exemption, construing that phrase to mean a direct employment relationship between private households and their domestic employees does not lead to the gap in coverage described by Petitioners (between domestics employed by households and those employed by covered enterprises). In other words, giving meaning to every word in § 213(a)(15) is fully consistent with congressional intent and is the only construction of the language that is so consistent.[2]

2. *The Legislative Context Of The 1974 Amendments Confirms Congressional Intent To Exempt Only Companions Employed Directly By Private Households*

The plain meaning of the term "domestic service employment" in the companionship exemption is confirmed by examining the context in which Congress adopted the 1974 amendments to the FLSA.

---

[2] Petitioners may argue that Respondent's "failure to make this exact argument below precludes its assertion here," but this Court should reject the contention as it did in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n. 27 (2001). Respondent argued in the Court of Appeals that "[t]he regulation is inconsistent with the plain meaning of the full text of the exemption" because "it exempts only employees '*employed in domestic service employment*,'" Brief at 24 (emphasis in original), and, for this reason, was invalid under *Chevron*. Reply Brief at 13. Thus, the argument presented above is not a new claim, or even "a new argument to support what has been [her] consistent claim" (which this Court made clear it would hear in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)), but merely a refinement of an existing argument in response to the suggestion (first advanced in DOL's December 2005 Advisory Memorandum) that Respondent's position would lead to a gap in coverage. And even if it were a new argument, "parties are not limited to the precise argument they made below," but rather, so long as they made the claim below (here that the regulation was inconsistent with Congress' intent), they can "formulat[] any argument they like[] in support of that claim here." *Id.*; *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). "Given the importance of the issue," this Court should, of course, consider Respondent's refined argument. *PGA*, 532 U.S. at 678 n. 27.

a. The Second Circuit correctly concluded, "It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." P.A. 30a. Indeed, there is absolutely no ambiguity about the fact that Congress did not intend the 1974 amendments in any way to *narrow* the FLSA's coverage. As DOL found in October 1974 – just six months after the amendments' adoption – "it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." 39 Fed. Reg. 35385 (1974). The express purpose of the amendments was to extend the Act's protections to domestics *not previously covered* because of uncertainty about whether they were individually engaged in interstate commerce – *i.e.*, to domestics employed by private households. Congress intended the companionship exemption not as a partial nullification of existing coverage of domestics employed by third-party enterprises but solely as a narrow limitation on the amendments' extension of coverage to domestics employed by private households.

It is important to understand that prior to the 1974 amendments the FLSA already covered domestics,[3] including companions, employed by third-party firms that met the test for enterprise coverage introduced by Congress into the Act in 1961, and expanded in 1966. *See* 29 U.S.C. §§ 206(a), 207(a)(1) (both applying to employees "employed in an enterprise engaged in commerce"), 203(r) and (s) (defining enterprise engaged in commerce).[4] Both Petitioners and the

[3] The Act did not expressly exempt any domestics prior to 1974, but it was not applied to domestics employed directly by private households because they were, as independent employees, not believed to be "engaged in commerce or in the production of goods for commerce" as required for individual, as distinct from enterprise, coverage. *See* 29 U.S.C. §§ 206(a), 207(a)(1)

[4] In 1974, an enterprise engaged in commerce included any enterprise "which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person,

Solicitor General concede this preexisting third-party coverage. Indeed, the Secretary of Labor had successfully sued several such third-party employers of domestics before the amendments. *See, e.g., Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home and Health Care Services, Inc. v. Carden*, 1974 U.S.Dist.LEXIS 9150 (M.D.Tenn. April 4, 1974), *aff'd*, 538 F.2d 98 (6th Cir. 1976). *See also* 1972 DOLWH LEXIS 19 at *2-3 (Aug. 20, 1972); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971). Notably, DOL recognized this preexisting coverage immediately after enactment of the 1974 amendments when first considering whether Congress intended the companionship exemption to cover employees of third-party firms. "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise," DOL found. "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." 39 Fed. Reg. 35385 (1974).

Congress knew of this preexisting coverage of domestics employed by third parties because DOL reported to Congress in both January 1973 and 1974: "Employees of household service business[es employing domestics] are presently covered by the FLSA if the business is a part of an enterprise under Section 3(s) of the Act." DOL, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Economic Effects Study Submitted to Congress 1973* at 27 n. 1; *id. 1974* at 32 n. 1. Moreover, these DOL reports are cited in both the Senate Committee Reports and, as Petitioners state, were quoted during floor debate. *See* S. Rep. No. 93-300, 93d Cong., 1st Sess. 21 (July 6, 1973); S. Rep. No. 93-690, 93d Cong., 2d Sess. 19 (Feb. 22, 1974); 119 Cong. Rec. 24796 (1973).

---

and which . . . is an enterprise whose annual gross volume of sales made or business done is not less than $250,000." 29 U.S.C. § 203(s)(1) (1974).

The express purpose of the amendments was to "expand the coverage of th[e] Act." H.R. Rep. No. 93-232, 93d Cong., 1st Sess. 1 (May 29, 1973). The Committee Reports comprehensively set forth the amendments' purposes to be raising the minimum wage and "extending the benefits and protections of the Act," but nowhere to be any form of *contraction* of coverage. *See, e.g*, H.R. Rep. No. 93-232 at 2, 8 ("It is the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as it presently practicable . . . ."); S. Rep. No. 93-300 at 1 ("to extend its protections to additional employees"), 2; S. Rep. No. 93-690 at 1; H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 1, 2 (March 15, 1974).[5] If Congress had any intent whatsoever to narrow coverage, surely it would have so indicated by qualifying its repeated characterization of the amendments as extending coverage

Thus, Congress intended the 1974 amendments to extend protection of domestics beyond previously covered employees of third-party enterprises, while qualifying only the extension by excluding one subset of the newly covered domestics – babysitters and companions directly employed by private households. The third-party regulation is inconsistent with this "symmetrical . . . scheme." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). It does not make "sense in terms of the statute's basic objectives." *Barnhart v. Walton*, 535 U.S. 212, 219 (2002).

b. It is evident from the vigorous floor debate in both houses of Congress over the 1974 amendments[6] that the dispute

---

[5] The Committee reports describe the steady extension of the Act's coverage since its adoption in 1938, *see, e.g.*, H.R. Rep. No. 93-913 at 4-9, but nowhere suggest that the proposed amendments were in any respect contrary to that historical pattern.

[6] Both the Senate and House specifically debated and voted on amendments to limit or eliminate the extension of coverage of domestics in the bills. *See* 119 Cong. Rec. 18352 (1973) (vote on Erlenborn substitute); *id.* at 24517 (vote on Dominick substitute); *id.* at 24796; 120 Cong. Rec. 5280 (1974) (vote on Dominick Amdt. No. 989).

centered on extending FLSA protection to domestics not previously covered precisely because they were employed by private households and by persons traditionally not considered to fall within the scope of the commerce power – in the words used throughout the debates, domestics employed by "housewives." Preexisting coverage of domestics employed by third-party enterprises was not contested. Neither opponents nor supporters of the amendments sought to eliminate or even narrow that preexisting coverage. No member of Congress presented any arguments to justify exempting any domestics employed by third-party firms. Their concerns did not center on either the nature of the services or their location. Rather, members of Congress focused on the identity of the employer and the distinctive employment relationship between domestics and private households.

Members of Congress made clear their understanding that the only domestic employees whose coverage was being contested were employees of private households and not third-party firms. Senator Williams, the cosponsor of the Senate bill, pointedly declared, "Compounding the workers' problems is the *lack of a third party intermediary* to whom the workers can appeal when treated unfairly. Faced with . . . a family that forces her to accept a 3-week unpaid vacation because they have decided to take a trip to Europe, the only recourse the worker has is to quit." 119 Cong. Rec. 24799 (1973) (emphasis added).[7] Congresswoman Mink stated, "It is likely that *employing households* will continue to offer the lowest possible pay as long as they are not required to do otherwise." 119 Cong. Rec. 18380 (1973) (emphasis added). Dissenting members of the Senate Committee also explained in the Committee Report that the proposed bill "extends coverage to . . . 836,000 *households employing domestics*." Sen. Rep. No. 93-300 at 115 (Minority views of Messrs. Dominick, Taft, and

[7] The statements of Senator Williams (as well as of Senator Javits and Congressman Dent cited *infra*), "as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526-27 (1982).

Beall) (emphasis added).[8] They quoted the Secretary of Labor who explained that at issue was "[a] *household who hires* a maid" where "the housewife can substitute her labor" when "[f]ew employers in other fields can do so." *Id.* at 121 (emphasis added).

Opponents of the amendments repeatedly made three arguments against extending coverage to domestics employed by private households – arguments that centered on the "housewife" as employer and that form the background for the ultimate adoption of the companionship exemption, but that in no way contested coverage of domestics employed by third-party firms. These arguments concerned the difficulty of enforcing the law against private households, the burdens on "housewives," and the limits of the commerce power.

First, opponents argued that the extension would be unenforceable due to the irregular nature of domestic employment by private households and noncompliance by such households. Representative Quie asserted that enforcement would be difficult because "[t]he domestics are not employed just by a few wealthy people who employ them full time. Most of the domestics are working where they spend 1 day on one job and another day on another job. They probably have five or six employers they are working for." 119 Cong. Rec. 18346 (1973). Senator Dominick explained, "We have an estimated 1 million domestic employees on the minimum wage only. . . [I]f we ask the housewives to make reports on these and if we make them file on them and make sure the minimum wage is paid, we will either have the greatest breach of law or a revolt." *Id.* at

[8] Senators Dominick and Taft were the most outspoken Senate critics of the extension of the Act's coverage of domestics. They introduced several amendments intended to eliminate or limit the extension. *See* S. 1725, 93d Cong., 1st Sess. (May 7, 1973); S. 2727, 93d Cong., 1st Sess. (Nov. 19, 1973); S. 2747, 93d Cong., 1st Sess., Amdt. No. 981 (Feb. 28, 1974), Amdt. Nos. 989, 990 (March 1, 1974); 119 Cong. Rec. 24796 (1973). Senator Beall, the third dissenting member of the Committee, also favored exempting "families with incomes, say around $15,000 from the minimum wage coverage" of domestics. 119 Cong. Rec. 24385 (1973).

24508. He later asked, "Do we want to try to pass a law which is not going to be abided by the householder, either in terms of amount or in terms of reporting?" *Id.* at 24797.

Second, opponents argued that extension of the Act to domestics employed by private households would impose an intolerable burden on the "housewife" employing domestics. Their concern centered on "housewives" newly completing FLSA paperwork like a business, and thus plainly had no application to third-party enterprises whose coverage and obligation to keep records were already established. The minority on the House Committee asked, "Do we really want to subject housewives to possible criminal penalties for failure to keep the records?" H. R. Rep. 93-232 at 95 (Minority Views). The minority on the Senate Committee quoted the testimony of the Secretary of Labor to the same effect: "It may be unrealistic to expect accurate recordkeeping. Homemakers are not engaged in business in the traditional sense with experience in maintaining business records." S. Rep. No. 93-300 at 121 (Minority Views). Representative Erlenborn, the primary House opponent of extending coverage to employees of private households,[9] declared during floor debate, "This will require every housewife who employs a worker on a 1-day–week basis or even a half-day-a-week basis to keep books and records. . . . The housewife will be subject to penalties if she does not keep the records." 119 Cong. Rec. 18155 (1973). Senator Fannin agreed: "I just cannot imagine the housewife struggling with the paper work which would be required." *Id.* at 24365.

Finally, opponents argued that the commerce power did not reach private households directly employing domestics, while it was established that covered enterprises employing domestics could be regulated. As Senator Dominick asked rhetorically about the extension of the Act to cover domestic employees employed by private households, "Are we going to take the position that the Senate of the United States determines that

[9] Congressman Erlenborn introduced a substitute bill intended to eliminate the extension of coverage of domestics. 119 Cong. Rec. 18336-37 (1973).

hiring the neighbor's boy, aged 14, to mow the lawn is substantially affecting interstate commerce?" *Id.* at 24797.

In countering these objections, the amendments' supporters also focused on the "housewife" as a party to the domestic employment relationship. Conversely, however, they sought to justify extending coverage beyond domestics employed by third-party firms to the disputed employees of private households. The amendments expressly found that "employment of persons in domestic service in households affects commerce." Pub.Law 93-259, §7, 88 Stat. 62 (1974) (codified at 29 U.S.C. § 202(a)). Buttressing this finding, the Senate Committee referred to domestic employees' use of vacuum cleaners and supplies shipped in interstate commerce and to their work freeing householders to engage in commerce. *See* S. Rep. No. 93-300 at 23. But no member of Congress found it necessary to cite data about the size and interstate operation of third-party employers of domestics.

Whereas the amendments' opponents doubted that the "housewife" would comply with the FLSA and do the paperwork that third-party employers of domestics had been doing for over a decade, supporters argued to the contrary, pointing to her experience under the Social Security Act. The Senate Committee Report stated, "this committee is convinced that legislation which clearly expresses the intent of the Congress with respect to fair labor standards for domestics will be followed by voluntary compliance on the part of most housewives." S. Rep. No. 93-300 at 22. Senator Javits pointed to the fact "that housewives pay Social Security today for those workers," explaining that "almost 1 million households, some 836,000, filed Social Security returns" and that "is a very representative number of the households which have full-time domestics . . . ." 119 Cong. Rec. 24802 (1973). Countering the undue burden argument, Senator Javits stated: "We gave domestics coverage under social security and in many States they are covered by unemployment compensation. This answers the question of hardship on the housewife. She is

making out social security quarterly statements now for domestic employees and paying the social security tax so she knows what she is paying and what the domestic gets every quarter." *Id.* at 24373. Responding to the "claim[] that covering domestic workers . . . will result in harassing housewives throughout all America," Senator Javits noted "that domestic workers have been covered under several State minimum wage laws; . . . and there is no evidence whatsoever that such coverage has resulted in harassment of housewives." *Id.* at 24360. Employer "housewives" already kept many types of records, stated Congressman Dent, "Every person who employs a domestic today must keep records for social security when the facts of life are that a Sears Roebuck revolving account is 10 times the work of keeping those records for a domestic worker." *Id.* at 18160. Congressmen Chisholm put it plainly, "This may come as a shock to the Members of this House, but in most homes it is the wife who handles the family budget, and bookkeeping. . . . To suggest that women do not know how to add and subtract is an insult to women and totally contrary to all existing evidence." *Id.* at 18341.

Supporters not only countered opponents' arguments concerning the peculiarities of the employment relationship between domestics and private households, but highlighted those very peculiarities to justify extending coverage beyond protection of domestics employed by third-party firms. Supporters pointed to arbitrary treatment by private household employers, stating that domestics had "no appeal against the employer who calls suddenly in the morning or announces upon arrival, 'We won't need you after all,'" H.R. Rep. No. 93-232 at 32, and that domestics "do not usually receive standard benefits such as . . . vacation, and holidays – even when their employers go on vacation." 119 Cong. Rec. 18356 (1973). Senator Williams asserted, "In lieu of fair wages, they are often given secondhand clothing and leftover food." *Id.* at 24799.

In light of the debates over the 1974 amendments in both houses of Congress, Petitioners' suggestion at 36 that "members

of Congress . . . were not thinking about the nature of the employer, but rather about the nature and location of the services" is indisputably false. To the contrary, it is patently clear that both supporters and opponents of the amendments were concerned about the effect of extending the FLSA to domestic employees employed by private households. But what members of Congress expressed no concern about was coverage of domestics employed by enterprises, which had existed for over a decade, nor, indeed, about any coverage of domestics employed by third-party firms.[10]

c. In extending coverage to domestics employed by households previously unprotected by the FLSA, the 1974 amendments borrowed directly from the Social Security Act amendments of 1950 and 1955. Both Committee Reports and members of Congress expressly and repeatedly likened the 1974 FLSA amendments to the Social Security amendments. *See* H.R. Rpt. No. 93-232 at 12, 31-32; S. Rep. No. 93-300 at 20, 22; S. Rep. No. 93-690 at 18, 20; H.R. Rep. No. 93-913 at 33; *supra* at 17-18. Indeed, one provision of the Social Security amendments was incorporated by reference into the FLSA. *See* 29 U.S.C. § 206(f)(1).

Both the Social Security and FLSA amendments extended the protections of federal employment law to domestics directly employed by private households for the first time[11] and both

---

[10] The only reference to this issue Petitioners cite is the occasional use of the term "private household workers" combined with a definition of that term to include employees of "household service business[es]" in a DOL report to Congress. But the point is that no member of Congress objected in any manner to coverage of employees of "household service business[es]." Moreover, if members were aware of the definition contained in that report they were also aware of its explanation that many employees of such business were already covered by the Act pursuant to its enterprise coverage, *supra* at 12, and they expressed no intention to narrow that preexisting coverage.

[11] As was the case under the FLSA, Congress' reluctance to cover domestics employed by households under the Social Security Act was "mainly because of the administrative difficulties which were believed to be involved in their coverage." S. Rep. No. 81-1669, 81st Cong., 2d Sess. 14 (May 17, 1950).

simultaneously accommodated the unique nature of that employment relationship in specific respects that limited the reach of only the new protections. The special treatment permitted by the Social Security amendments was the exclusion of domestics employed by households paid less than $50 a quarter,[12] the exclusion of non-monetary compensation paid to domestics employed by households, and the leeway granted household employers to round wages. 42 U.S.C. §§ 409(a)(6)(B); 409(a)(6)(A); 409(c). The special treatment permitted by the FLSA amendments was the exclusion of domestics employed by private households from the minimum wage requirement if they are paid less than $50 a quarter (by incorporating the Social Security provision) and from both the minimum wage and maximum hour provisions if they provide companionship or babysitting services. 29 U.S.C. §§ 206(f)(1), 213(a)(15). Thus, the concerns about burdening households raised in the amendment debates found their way into the framing of the companionship exemption, which accommodated the unique relationship between households and their domestic employees by recognizing both babysitting and companionship as the archetypical arrangements among "neighbors" deserving exclusion as "domestic service employment."

d. In the babysitter/companionship exemption, opponents and supporters of extending the FLSA's coverage of domestics found common ground because, while opponents maintained that all the proposed, new coverage of domestics employed by households would unduly burden "housewives," supporters did not believe that babysitters and companions employed by such "housewives" were "regular bread-winners." Both 1974 Committee Reports explain, "People who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." H.R. Rep. No. 93-913 at 36. *See also* S. Rep. No. 93-690 at 20. Thus, a majority of both houses concluded that the amended FLSA could avoid imposing the burdens of compliance on households employing

[12] This threshold is now $1,000 in a calendar year. *See* 42 U.S.C. § 409(a)(6)(B) *and* 26 U.S.C. §3121(x).

babysitters and companions via the exemption without compromising the goals of the amendments. The express exclusion of companions was introduced into the bill by the Conference Committee in 1973 and its Report also articulates the understanding reiterated by the two 1974 Committee Reports: "The conferees believe that the people who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." S. Rep. No. 93-358, 93d Cong., 1st Sess. 7, 27 (July 28, 1973).

These authoritative statements of legislative purpose[13] make clear that Congress understood the exemption to reach only the irregular employment characteristic of the relationship between private household employers, on the one hand, and babysitters and companions, on the other. In contrast, companions employed by third-party firms often work on a full-time, permanent basis and are often assigned to multiple households. These employees of third-part firms are the "professional domestic[s]," whom Senator Burdick stated he was "not concerned about" in discussing the scope of the exemption. 119 Cong. Rec. 24801 (1973). Unlike companions directly employed by households, whom Congress intended to exempt because they were not "regular" family bread-winners, it is the "professional" companions employed by third-party firms whom Congress intended to continue to protect because they are likely to be "regular bread-winners." Thus, the third-party regulation is not justified by the central congressional concern about burdening "housewives" and is inconsistent with all three Committee Reports' descriptions of the exemption's scope.

Petitioners, however, assert that the purpose of the exemption was to enable those needing companionship services to purchase them at an affordable price and that such a purpose is served by applying the exemption to employees of third-party

---

[13] *See Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.")

firms.[14] But this asserted purpose is not based on any reliable expression of legislative intent, such as that consistently spelled out in all three Committee Reports, but rather on misreadings of four isolated remarks during the floor debates, none of which concerned employees of third-party firms and only one of which concerned the exemption at all.

The first cited comment is that of Senator Taft, but notably he was not speaking about the companionship exemption at all, but rather in favor of a proposed amendment intended generally "to strike the added coverage of the committee bill for domestic employees," which was voted down shortly after his comment. 118 Cong. Rec. 24714, 24720 (1972).

The second comments are those of Senator Dominick, who again, however, was not addressing the companionship exemption at all, but rather, like Senator Taft, was promoting an amendment "designed to . . cut out of the committee bill the additional coverage that was put in there on the so-called domestics." 119 Cong. Rec. 24796 (1973). This amendment too, like Senator Taft's, was rejected shortly after Senator Dominick's comments. *Id.* at 24802.[15] Starting with the hypothetical of the teenager "mowing your lawn," *id.* at 24796, Senator Dominick muses about members "who from time to time employ a cook, a cleaning woman, or whatever it may be, pay them in cash," and then quotes the cited letter from a woman who hired a helper to care for her elderly mother. His remarks relate in each instance solely to domestics employed directly by households and his point is that an extension of the law to such domestics "is not going to be abided by by the householder." *Id.* at 24797. In fact, it was not the expense of wages paid by householders that concerned Senator Dominick, but instead, as he explained, the burden of paper work: "That

[14] This rationale was not articulated in any manner when the regulation was adopted. *See* 40 Fed.Reg. 7404 (1975).

[15] It is important to understand that the amendment the Senator was speaking in favor of was to a bill which, according to the Senate Report, already excluded companions. *See* S. Rep. No. 93-300 at 22.

is what I am objecting to, not the amount of money to pay for domestic help. It is the recordkeeping involved." *Id.* at 24798.

The third comment is that of Senator Johnston, but he simply refers to the letter from the household employer read by Senator Dominick (in support of his proposed amendment eliminating all coverage of domestics) and then points out that the concern about the cost of domestics – whom he did not limit to companions – only applies to working people because "for those people who do not work . . . domestic service is a luxury rather than a necessity." *Id.* at 24798.[16]

The final comment – the only one pertaining to the exemption, but not to employees of third-party firms – actually supports Respondent's position. Addressing the meaning of companionship services as used in the Committee Report, Senator Burdick makes clear his conception of the exempt companion as a "neighbor." Senator Burdick explains, "I am not concerned about the professional domestic who does this as a daily living." *Id.* at 24801. Rather, his concern was for "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and *a neighbor* comes in and sits with them." *Id.* (emphasis added). This neighborly companion is the antithesis of the "professional domestic" employed by a third-party firm. Rather, the "neighbor" is hired directly by the household in need to "sit" with elderly or infirm family members as a companion. Senator Burdick's concern was not with the ability of household employers to afford companionship services, but rather with the typically irregular nature of such neighborly employment and with assuring that "incidental" work, such as making lunch or throwing diapers in the washing machine, would not remove such services from the companionship exemption. *Id.* Thus, none of these four comments in any way suggests that the purpose of the

[16] Senator Dominick understood Senator Johnston to be suggesting eliminating coverage of domestics only when all household members work: "as I understand it from the Senator's theory, if there is someone in the household who is not working, then they have to pay the minimum wage for all this help they may be hiring." *Id.* at 24798.

companionship exemption was reducing the cost of services[17] or that any member of Congress sought to exempt companions employed by third-party firms. To the contrary, the comments of each of these Senators focus exclusively on household employers who are "private individuals." *Id.* at 24798.[18]

This Court's statement in *Chevron* aptly applies to the isolated and inapposite comments relied on by Petitioners: "The general remarks pointed to by respondents 'were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire . . . .'" 467 U.S. at 862.

In *Chevron*, this Court held, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The third-party regulation is contrary to clear congressional intent and thus must be rejected regardless of whether it is due *Chevron* deference.[19]

B. The Third-Party Regulation Is Contrary To 29 C.F.R. § 552.3 Which Defines The Term "Domestic Service Employment" In The Exemption And Is Therefore Entitled To Greater Deference

The Second Circuit found the third-party regulation to be "jarringly inconsistent" with 29 C.F.R. § 552.3 and the latter to

---

[17] Indeed, if that was the purpose there is no reason why Congress limited the exemption to employees employed in private homes rather than extending the exemption to employees of day-care centers and nursing homes.

[18] Moreover, none of the Senators whose comments are cited were on the Conference Committee that inserted the companionship exemption into the bill. *See* S. Rep. No. 93-358 at 35.

[19] Petitioners cite Congress' inaction after promulgation of the third-party regulation but inaction is relevant only when "an agency's statutory construction has been 'fully brought to the attention of . . . Congress,' and the latter has not sought to alter that interpretation." *North Haven*, 456 U.S. at 535. Where, as is the case here, "there is no . . . evidence to suggest that Congress was even aware of the [agency] interpretive position. ' . . . we consider . . . re-enactment [which also did not occur here] to be without significance.'" *Brown v. Gardner*, 513 U.S. 115, 121 (1994).

be "entitle[d] to greater deference." P.A. 30a.[20] § 552.3 provides: "As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." This definition is repeated in slightly different words, also clearly requiring employment directly by the private household, in 29 C.F.R. § 552.101(a): "The domestic service must be performed in or about the private home of the employer . . . ."[21] Because the third-party regulation conflicts with the plain language of § 552.3, this Court need not decide if *Chevron* deference is due the third-party regulation as, whatever degree of deference it is due, greater deference is due § 552.3 because DOL promulgated § 552.3 pursuant to its delegated authority to "define[] and delimit[]" the exemption's terms.[22]

Congress possesses constitutional authority to specify the degree of deference courts should accord agency construction of statutes. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). If Congress states that an agency's construction is entitled to no deference, *Chevron*

---

[20] In the 2001 proposed revisions of the third-party regulation discussed *infra* at 49, DOL agreed that "the current regulations contain an internal inconsistency." 66 Fed. Reg. 5485 (2001).

[21] § 552.101(a) states that the definition is "derived from the regulations issued under the Social Security Act (20 CFR 404.1057)." As promulgated in 1975, the reference was to 20 C.F.R. § 404.1027(j). *See* 40 Fed.Reg. 7406 (1975). That rule reiterated *three times* that the employer must be the homeowner. "*Domestic service defined.* Services of a household nature performed by an employee in or about a private home of the person by whom he is employed constitute domestic service in a private home of the employer. . . . Remuneration for the services above enumerated is not within this exclusion from wages unless performed in or about a private home of the employer. Remuneration for services not of a household nature . . . , even though performed in the employer's home, is not within this exclusion from wages." 20 C.F.R. § 404.1027(j) (1974).

[22] In fact, even if this Court holds that the same degree of deference is due both regulations, it should still follow §552.3 because it is more persuasive.

deference, or something in between, that instruction must be followed by the courts. Doing so honors *Mead*'s command to "tailor deference" to the "broad range of statutory authority." 533 U.S. at 236.[23] Often congressional intent is unclear in this regard, but a clear expression of intent is binding[24] and the 1974 amendments contain such a clear expression of intent.

Congress clearly intended DOL regulations "defin[ing] and delimit[ing]" the terms of the statutory exemption to have the force of law and to be accorded the highest degree of deference because the delegated authority to "define[] and delimit[]" is authority to fill in the details of the law. While the degree of deference Congress intended courts to afford regulations adopted pursuant to the general grant of rule-making authority may be debatable, Congress clearly intended that such regulations be accorded less deference than regulations "defin[ing] and delimit[ing]" statutory terms. In this case, it is only § 552.3 that "defined and delimited" the exemption's terms. *See* 29 C.F.R. § 552.2(c).

It is well established that regulations that "define[] and delimit[]" terms in the FLSA are entitled to greater deference

---

[23] Justice Breyer has written, "Congressional intent to make agency decisions of law binding is really a question of *how much* deference Congress intended courts to pay to the agency's decisions, a matter of degree, not kind, and a matter to be considered by examining a particular statute." Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986).

[24] Again, Justice Breyer has written, "Of course, reliance on any or all of these factors as a method of determining a 'hypothetical' congressional intent on the 'deference' question can quickly be overborne by any tangible evidence of congressional intent." *Id.* at 371. Justice Scalia has agreed that "any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989). Professor Thomas Merrill writes, "Congress has ultimate authority over the scope of the *Chevron* doctrine, and . . . the courts should attend carefully to the signals Congress sends about its interpretative wishes." Merrill & Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

than other regulations implementing or interpreting the Act. Indeed, over 60 years ago, the Second Circuit concluded, "Because of his express authority to make them, the Administrator's definitions have a greater dignity than ordinary administrative interpretations." *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944). And this Court has consistently granted greater deference to DOL regulations "defin[ing] and delimit[ing]" statutory terms then to DOL's other interpretations of the statute. *Compare Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944), *with Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 182 (1946), *and Skidmore*.

A contrary understanding of congressional intent would make the two grants of rule-making authority redundant. Professor Thomas Merrill, among the nation's preeminent administrative law scholars, has described the situation at issue here – "a statute that includes both general and more specific rulemaking grants that overlap" – as "[t]he most compelling example" of when the structure of a statute evidences congressional intent concerning the degree of deference owed agency rules. Merrill & Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 484 (2002). "[G]iven the overlap it is reasonable to argue that the general grant confers only housekeeping powers, while the narrower grants confer legislative powers." *Id.* at 485.

And here it is not simply that one grant is "narrower," for Congress used different words in the two grants of rulemaking authority in the 1974 amendments, and the words clearly signal its intention to confer different degrees of authority on the resulting rules. The grant of authority to "define[] and delimit[]" statutory terms is a grant of authority actually to specify the terms of the law. This Court so held in *Addison*, regarding a DOL regulation adopted pursuant to statutory authority to "define[]" the term "area of production" as then used in an FLSA exemption. 322 U.S. at 613. This Court paid special attention to "[t]he parenthetical qualification '(as defined

by the Administrator),'" comparing it to the parenthetical in the primary statutory exemptions (for executive, administrative and professional employees) – "(as such terms are defined and delimited by regulations of the Administrator)" – which is parallel to the parenthetical grant of authority in § 213(a)(15) – "(as such terms are defined and delimited by regulations of the Secretary)." *Id.* at 613 and n. 6. Based on that delegation of law-making authority, this Court concluded, "Congress left the boundary-making to the experienced and informed judgment of the Administrator. . . . [The] judgment belongs to him and not to the courts. For Congress has cast upon him the authority and the duty to define the 'area of production' . . . ." *Id.* at 614. In relation to the primary statutory exemption in § 213(a)(1), this Court recognized that "[t]he FLSA grants the Secretary broad authority to 'define and delimit' the scope of the exemption." *Auer v. Robbins*, 519 U.S. 452, 456 (1997). *Cf. Batterton v. Francis*, 432 U.S. 416, 425 (1977) ("Congress . . . expressly delegated to the Secretary the power to prescribe standards. . . . In exercising that responsibility, the Secretary adopts regulations with legislative effect.") In contrast, the general grant contained in the 1974 amendments provides ambiguously that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders *with regard to* the amendments made by this Act." Pub. Law 93-259, § 29(b), 88 Stat. 76 (April 8, 1974) (emphasis added).

It is for this reason that both the Petitioners and the Solicitor General erroneously assert that the third-party regulation was adopted pursuant to both grants of authority. But this assertion is refuted by the unambiguous statement in DOL's regulations themselves: "The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c). These expressly enumerated sections do not include the third-party regulation which is § 552.109(a). DOL's 1974 Notice of Proposed Rulemaking also clearly stated that it was DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A*, the terms [used in the amendments] . . ., and setting forth, *in Subpart B* [which

includes the third-party regulation], a statement of policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (1974) (emphasis added).

Both Petitioners and the Solicitor General also argue erroneously that the two regulations are not in conflict, relying on DOL's December 2005 Advisory Memorandum. But the Memorandum reconciles the regulations only by effectively deleting operative words from the definitional regulation. The Memorandum concedes that § 552.3 "could be read to exclude companions who are employed by third party employers from the scope of the exemption." P.A. 56a. But the Memorandum suggests that the plain phrase "performed by an employee in or about the private home (permanent or temporary) of the person by whom he or she is employed" should instead be read to mean "performed by an employee in or about a private home." P.A. 57a-63a. This reading simply deletes the final ten words of the regulation and is therefore obviously impermissible. Paradoxically, the Memorandum relies on the maxim that courts must read regulations to "harmonize the various parts and provisions of the entire regulation and give them effect, if possible." P.A. 56a. However, the DOL does not credit this maxim as it applies to the Act itself or to § 552.3 because the reading of § 552.3 proposed in the Memorandum renders the word "employment" in the statutory exemption superfluous (as explained *supra* at 5-7) and simply ignores the words "by whom he or she is employed" in § 552.3.[25] The Memorandum's

[25] Apparently for no purpose other than to further's Petitioners' argument that Respondent's position would lead to a gap in coverage, the Memorandum further proposes ignoring § 552.3's statement that it defines the term "domestic service employment" only "[a]s used in section 13(a)(15)." P.A. 60a n. 1. This is not only impermissible because the language is not ambiguous, but also because § 552.2(c) provides that "the definitions required by section 13(a)(15) are contained in §§ 552.3 . . . ." The coverage provisions not only do not use the term "domestic service employment," Congress did not grant DOL authority to define and delimit their terms. That § 552.3 describes services performed in "domestic service employment" other than babysitting and companionship is irrelevant because only

proposed construction of the two regulations avoids the conflict between them only by honoring the words of the third-party regulation instead of those in the Act and § 552.3. Thus, the Memorandum employs the maxim as it suits its purposes but flouts it in other respects.

The Memorandum's suggestion that the phrase "of the person by whom he or she is employed" has no purpose except to specify where the work must be performed is belied by the contentious debate in both houses of Congress concerning whether the Act should apply to domestics employed by "housewives." Who is the "housewife" haunting the floor debates if not the exemplar for Congress of the private household employer clearly referred to in the crucial § 552.3 phrase "of the *person* of whom he or she is employed?" To Congress, certainly the "person" employing the domestic mattered at least as much as the place of service. While the Memorandum rightly states that "the legislative history must be consulted" to determine the meaning of the phrase "of the person by whom he or she is employed," P.A. 57a, it proceeds to ignore that history in effectively deleting the phrase from § 552.3. In the wake of the debate over the 1974 amendments, which had as its central, if not exclusive, focus the identity of the employer, DOL was certainly aware of the import of the phrase "of the person by whom he or she is employed" when it inserted the phrase into the definition of "domestic service employment" in 1974.

Moreover, the Memorandum's curt dismissal of the phrase as "an extraneous vestige of the language's origin in the Social Security regulations," P.A. 57a, ignores two crucial legislative facts: Congress cited the Social Security Act as the only

---

combined with § 552.6 defining companionship services does § 552.3 fully define the scope of the exemption. Finally, the same limiting phrase is used in §§ 552.4, .5 and .6 defining the words "babysitting services," "casual basis," and "companionship services for the aged and infirm," which, like the words "domestic service employment," are unique to § 213(a)(15). Thus, in an effort to defend its third-party regulation, DOL seeks to nullify most of the operative provisions of § 552.3.

existing model of federal regulation of the relationship between "housewives" and their domestic employees; and in both Acts Congress accommodated the distinctive nature of that domestic employment relationship in specific respects, including the FLSA's companionship exemption. *See supra* at 19-20. The Memorandum's reading of the phrase "in or about the private home . . . of the person by whom he or she is employed" in § 552.3 to have a different meaning than the virtually identical language in both the Social Security Act and its regulations, *see* 42 U.S.C. § 409(a)(6)(A), (B); 26 U.S.C. § 3121(a)(7)(A), (B); 20 C.F.R. § 404.1057(a); 26 C.F.R. § 31.3121(a)(7)-1(a)(2), is inconsistent with their intertwined origins.[26]

Finally, the Memorandum's reading of the phrase "in or about a private home . . . of the person by whom he or she is employed" to refer *solely* to the place of employment is also contradicted by the express reference to the place of employment in both §§ 206(f) and 207(l). The 1974 amendments extended the minimum wage requirement to "Any employee -- (1) who in any workweek is employed in domestic service *in a household*" or "(2) . . . *in one or more households*" and the overtime pay requirement to "any employee in domestic service *in one or more households*." 29 U.S.C. §§ 206(f), 207(l) (emphasis added). Thus, if Congress had intended the phrase

---

[26] The Solicitor General's suggestion at 27 n. 7 that the words "of the employer" used in the Social Security Act and its regulations distinguish domestic service performed in a private home from that performed in a college club under 26 U.S.C. § 3121(b)(2); 42 U.S.C. § 410(a)(2); 26 C.F.R. § 31.3121(b)(2)-1(a); and 20 C.F.R. § 404.1014 is incorrect as in order to qualify for special treatment each type of employment must have three elements: (1) it must be domestic service, (2) it must be in a private home or college club, and (3) the household must be the employer or the employee must be a student at the college. The Solicitor General's effort to read the reference to the household being the employer out of the Social Security regulations (as well as § 552.3) is inconsistent with the Social Security Administration's construction. *See Social Security Handbook* §§ 916.1, 917.4 ("If you are a domestic worker employed by landlords or rental agencies to do work in or about property being rented as a private home, you are not performing work in the private home of the employer.")

"employed in domestic service employment" to refer solely to the place of employment and not also to the identity of the employer and if DOL had similarly intended the phrase "in or about a private home . . . of the person by whom he or she is employed" to refer only to location, surely both Congress and DOL would have simply used the same clear language used in §§ 206 and 207 to accomplish that purpose, but neither did.

Petitioners and the Solicitor General attempt to lean on the deference due an agency's construction of its own regulation. But such "deference is warranted only when the language of the regulation is ambiguous" or, in other words, "unless an 'alternative reading is compelled by the regulation's plain language.'" *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512(1994). Here there is no ambiguity in the words "of the person by whom he or she is employed."[27] The Memorandum does not contend those words are ambiguous[28] or in any way explain why they are ambiguous nor does it then construe the words. Rather, it proposes simply ignoring them and thereby impermissibly revising the regulation.

Moreover, as this Court has recently held, the fact that "the current interpretation runs counter to the 'intent at the time of the regulation's promulgation' is an additional reason why *Auer* deference is unwarranted." *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 907 (2006). DOL's original intent is evidenced not only by the unambiguous text of § 552.3, but also the statement in the parallel § 552.101(a) that the definition is derived from Social Security regulations which clearly apply only to domestics employed by households. *See supra* at 25 n. 21.

---

[27] And even if there were any ambiguity in § 552.3, the reference to the Social Security regulation as the source of the language in the parallel § 552.101(a) eliminates it. *See supra* at 25 n. 21.

[28] Petitioners argue the regulation is ambiguous only because it conflicts with the third-party regulation. But two unambiguous regulations can conflict and that does not render either of them ambiguous.

Finally, the Memorandum's reading of § 552.3 is contradicted by at least eight DOL Opinion Letters as well as by DOL's Field Operations Handbook, all of which read the words "by whom he or she is employed" in § 552.3 to require that the household employ the companion. *See* 1999 DOLWH LEXIS 73 at * 2 (June 18, 1999); 1999 DOLWH LEXIS 59 at *1-2 (May 20, 1999); 1999 DOLWH LEXIS 23 at *1 (Feb. 26, 1999); 1999 DOLWH LEXIS 1 at *2 (Jan. 6, 1999); 1998 DOLWH LEXIS 75 at *1 (Aug. 28, 1998); 1998 DOLWH LEXIS 71 at *3-4 (Aug. 11, 1998); 1994 DOLWH LEXIS 97 at *2-3 (Nov. 30, 1994); 1986 DOLWH LEXIS 105 at *4 (Aug. 12, 1986); Wage and Hour Division, Field Operations Handbook § 11d00(c) (1994).[29] All of these Opinion Letters pointedly rest their conclusion on the crucial phrase "of the person by whom he or she is employed," as evidenced by the fact that the three most recent Opinion Letters all highlight that phrase.[30]

---

[29] The Opinion Letters require that the household be at least the joint employer of the employee. They are thus inconsistent with the Memorandum's reading of § 552.3 and with the third-party regulation, which do not require any form of employment by the household. Moreover, while this Court need not reach the question, exempting a companion jointly employed by the household and a third party is inconsistent with congressional intent as explained *supra* at 5-24 as well as with § 552.3 which requires that the homeowner be "*the* person by whom [the companion] is employed" (emphasis added) not "*a* person by whom [the companion] is employed." The Handbook reads §§ 552.3 and .101 to provide that "an employee of a home cleaning service employer is not a domestic service employee." While the Solicitor General states that the Memorandum "repudiates and withdraws" all previous inconsistent statements, including that in the Handbook, the Handbook remains posted with this language intact on the DOL's web site as of the filing of this Brief.

[30] In addition, in 1993 and 1995, DOL proposed revising the third-party regulation to "make it clear that the exemptions are available only to those employees who meet the definition of 'domestic service employment' as set forth in § 552.3, which states that 'domestic service employment' means '. . . services of a household nature performed by an employee *in or about a private home (permanent or temporary) of the person by whom he or she is employed.*'" 58 Fed.Reg. 69311 (1993) (emphasis in original); 60 Fed. Reg. 46797 (1995). The proposal explained that "[t]his definition is based on the

Because § 552.3's definition of the terms of the exemption conflicts with the third-party regulation and because § 552.3 is entitled to greater deference, this Court should affirm the Second Circuit without reaching the question of how much deference is due the third-party regulation.[31]

II. THE THIRD-PARTY REGULATION IS NOT ENTITLED TO *CHEVRON* DEFERENCE

A. DOL Did Not Exercise Its Delegated Law-Making Authority In Promulgating The Third-Party Regulation

The Second Circuit's holding that the third-party regulation is not entitled to *Chevron* deference is expressly and correctly based on *Mead*. This Court held in *Mead* that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit based its holding on the second prong: "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" P.A. 26a (quoting *Mead*, 533 U.S. at 226-27). The Second Circuit correctly held that the regulation "does not

---

legislative history." 58 Fed. Reg. 69311. The proposal, like the Opinion Letters, would have required that the household be at least a joint employer of the companion. *Id.* at 69312. Neither proposal was ever withdrawn and thus DOL never explained why they were not adopted. DOL did repudiate its earlier Opinion Letters in 2002 DOLWH LEXIS 11 at *4 (Aug. 16, 2002), but it did so without *any* discussion of the statutory language, the legislative history, or the language in § 552.3.

[31] In contrast to its attempt to ignore the phrase "of the person by whom he or she is employed" in § 552.3, DOL might have authority to construe it to encompass a family-member employer living outside the home, consistent with Congress' intent not to exempt employees of third-party firms, in order to address Petitioners' concern for the severely disabled. Alternatively, the family member might act as employer in the capacity of guardian of the severely disabled householder and thus satisfy § 552.3.

qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." P.A. 26a.

The regulatory record makes clear that DOL made a deliberate decision not to exercise its delegated authority to "make rules with force of law" in promulgating the third-party regulation. In 1975, when the regulation was promulgated, DOL was certainly aware of the distinctions (1) between rules adopted pursuant to its authority to "define[] and delimit[]" statutory terms and rules not adopted pursuant to that authority and (2) between substantive and interpretive regulations. DOL was also certainly aware of the different degrees of judicial deference that hinged on those two distinctions. Thus, DOL knowingly and intentionally (1) did not "define[] and delimit[] the statutory terms to include companions employed by third parties in pointed contrast to § 552.3 and other regulations promulgated at the same time that expressly did supply those definitions. Rather, DOL knowingly and intentionally (2) characterized the third-party regulation as "a statement of policy and interpretation" again in pointed contrast to § 552.3 and other "general regulations." DOL's simultaneous promulgation of these two sets of regulations under critically different administrative law rubrics cannot be dismissed as meaningless labeling. Rather, DOL deliberately denied the third-party regulation the "force of law" requisite to *Chevron* deference.

As explained *supra* at 26-28, the 1974 amendments vested two types of authority to adopt regulations in DOL. At that time, DOL fully understood the implications of not adopting a regulation pursuant to its authority to "define[] and delimit[]" the statutory terms but rather classifying it as an "interpretation." In fact, this Court had made those implications clear in its paired decisions in *Addison* and *Skidmore*. As explained *supra* at 27-28, in *Addison* this Court accorded binding force to a DOL regulation adopted pursuant to its statutory authority to "define[]" a term in an exemption. In *Skidmore*, by contrast, considering a DOL construction of the

Act that was not adopted pursuant to such an express delegation of law-making authority, this Court concluded, "We consider that the rulings, *interpretations* and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140 (emphasis added). *See also Mabee*, 327 U.S. at 182 (Administrator's "interpretations" entitled only to *Skidmore* deference).

The lower federal courts followed this Court's lead in the years before (and after[32]) 1974. When DOL exercised its authority to "define[] and delimit[]" statutory terms, the courts held that so long as the "regulations are reasonable, they are as binding on the courts as if they had been directly enacted by Congress." *Fanelli*, 141 F.2d at 218.[33] In contrast, when DOL acted outside its authority to "define[] and delimit[]" statutory terms and adopted interpretive regulations, the lower courts accorded them only *Skidmore* deference. In *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249, 257 (5th Cir. 1969), for example, the Court held, "The Secretary's interpretation [codified as a regulation], of course, is not binding on the courts, but it is entitled to careful consideration. . . ."[34]

Similarly, the distinction between legal regulations, on the one hand, and statements of policy and interpretive regulations, on the other hand, and the consequences of an agency's classification for judicial deference were both well established in 1974. The distinction is embodied in the Administrative Procedures Act of 1946, 5 U.S.C. §§ 553(b)(3)(A) and (d)(2) (exempting "interpretative rules" and "general statements of

---

[32] *See infra* at 39.

[33] *See also, e.g., Helliwell v. Haberman*, 140 F.2d 833, 834 (2d Cir. 1944); *Walling v. Yeakley*, 140 F.2d 830, 832(10th Cir. 1944); *Knight v. Mantel*, 135 F.2d 514, 517 (8th Cir. 1943).

[34] *See also, e.g., Goldberg v.* Sorvas, 294 F.2d 841, 847 (3d Cir. 1961); *Futrell v. The Columbia Club, Inc.*, 338 F.Supp. 566, 571 (S.D.Ind. 1971); *Wessling v. Carroll Gas Co.*, 266 F.Supp. 795, 799 (N.D.Ia. 1967); *Goldberg v. Sullivan*, 208 F.Supp. 266, 270 (M.D.Ga. 1962).

policy" from notice and comment requirement). The Attorney General's 1947 *Manual on the Administrative Procedure Act*[35] also distinguished between "*[s]ubstantive rules* . . . issued by an agency pursuant to statutory authority and which implement the statute" and both "*[i]ntrpretative rule[s]* – rules or statements issued by an agency to advise the public of the agency's construction of the statutes . . . which it administers" and "*[g]eneral statements of policy* – statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Id.* at 39. And the *Manual* provided that only substantive "rules have the force and effect of law." *Id.*

In fact, DOL has itself since 1947 defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.'" 29 C.F.R. § 790.17(c). *See* 29 C.F.R. Part 790 ("Source: 12 FR 7655 (Nov. 18, 1947)"). DOL further explained, "The correctness of an interpretation of the . . . Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. . . .[S]uch interpretations provide a practical guide as to how the office representing the public interest in enforcement of the law will seek to apply it." 29 C.F.R. § 790.1(c).[36]

Justice Scalia has explained the well understood difference between legislative and interpretative rules that prevailed at the time the third-party regulation was adopted: in that pre-*Chevron* "era . . . we declined to give agency interpretations (including

---

[35] Justice Scalia has described the Attorney General's *Manual* as "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight." *Bowen*, 488 U.S. at 218 (Scalia, J., concurring).

[36] The Solicitor General correctly states that the definition in § 790.17(c) was adopted for the purpose of informing the public how DOL construed the term "interpretation" in the good faith defense created by the 1947 Portal-to-Portal Act, 29 U.S.C. § 259(a). Nevertheless, the definition is relevant to DOL's understanding and intention when it classified the third-party regulation as an interpretation in 1974.

interpretive regulations, as opposed to 'legislative rules') authoritative effect." *Christensen*, 529 U.S. at 589 (Scalia, J., concurring).

Thus, fully aware of and having expressly adopted the administrative law principles governing in 1974/75, including, specifically, the existing jurisprudence of deference under the FLSA, DOL (1) expressly declined to promulgate the third-party regulation pursuant to its authority to "define[] and delimit[]" the terms of the statutory exemption, *see* 29 C.F.R. § 552.2(c), 39 Fed. Reg. 35382 (1974); (2) instead designated it "a statement of policy and interpretation," *see id.*; and (3) classified it among the "Interpretations" not the "General Regulations," *see* 29 C.F.R. Part 552. The language used by DOL to describe Subpart B in 1974 – "a statement of policy and interpretation" – iterates *Mead*'s subsequent designation of "interpretations contained in policy statements" as "beyond the *Chevron* pale." 533 U.S. at 234.[37]

DOL's formal classification of its regulations, therefore, cannot be dismissed as meaningless labeling, but instead represents a knowing and deliberate decision by the agency, specifying which of its regulations were and which were not adopted pursuant to its delegated authority "to make rules carrying the force of law." DOL intended the two sets of regulations to be accorded different weights and expressly so provided in § 552.2(c) (one of the General Regulations). To

[37] In addition, the contents of the regulations in Subpart B reflect DOL's intention that they be used to guide administrative action, for example, § 552.100(c) and (d) announce what credits against the minimum wage "the Administrator will accept" for meals and lodging. Their style is also consistent with a statement of policy, containing references to the legislative history and cases, explanations of the source of regulatory language, background commentary, and tentative conclusions. *See, e.g.*, 29 C.F.R. §§ 552.100(b) (citing Senate Report); 552.101(a) (same); 552.104(a) ("The rationale for this exclusion . . . ."); 552.105(a) ("It is clear from the legislative history . . . .") ("This types of operation, however, could, depending on the particular facts, qualify . . . ."); 552.108 ("Congress made no change . . . ."). The regulations also provide for the public to petition for a revision of the general regulations, but not the interpretations. *See* 29 C.F.R. § 552.7.

accord both sets of regulations the same degree of deference would thus itself be an improper refusal to defer to the agency's regulations. The Second Circuit correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." P.A. 26a.

The Courts of Appeal are in complete harmony in according the DOL's "interpretations" of the primary statutory exemption (29 U.S.C. § 213(a)(1)) only *Skidmore* deference even though they too were promulgated as regulations.[38] *See Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.17 (3d Cir. 1994); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990). These cases rest on the fact, explained above, that "[t]he Secretary's regulations are promulgated pursuant to an express delegation of legislative authority" while the interpretations (even though they are codified as regulations) were not. *Newspapers of New England*, 44 F.3d at 1070. *See also New York*, 3 F.3d at 587 ("In contrast to the controlling authority given the Secretary's *legislative* rules – *i.e.*, those promulgated pursuant to an express grant of Congressional authority – the respect accorded the Secretary's *interpretive* regulations depends upon their persuasiveness.")[39]

---

[38] Under § 213(a)(1), which exempts executive, professional, and administrative employees, DOL has, since 1949, promulgated regulations classified as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705 (1949); 14 Fed. Reg. 7730 (1949); 29 C.F.R. Part 541 (2004). Acting after notice and comment, DOL recently consolidated its General Regulations and Interpretations in Part 541 both into its "General Regulations," *see* 29 C.F.R. §§ 541.0 *et seq.*, in part, to "eliminate confusion regarding the appropriate level of deference to be given to the provisions." 68 Fed. Reg. 15563 (2003). Significantly, DOL has *not* taken similar action in respect to the general regulations and interpretations in Part 552.

[39] Petitioners and the Solicitor General argue that these cases are inapposite because the interpretive regulations relating to the § 213(a)(1) exemptions

Petitioners argue that in *Auer* this Court held to the contrary because it accorded *Chevron* deference to a regulation construing an exemption that was classified as an interpretation. But the degree of deference due the regulation was not at issue in *Auer*. The Court of Appeals expressly did not reach the question of the regulation's validity and did not discuss *Chevron* or the degree of deference due the regulation. *See* 65 F.3d 702, 710 n. 6 (8th Cir. 1995). None of the briefs state a question related to the degree of deference due the regulation. Brief for Petitioners, 1996 U.S.S.Ct. Briefs LEXIS 544 at *1-2; Brief for Respondents, *id.* 632 at *1-2; Brief for the United States, *id.* 647 at *1-2. Respondents, who challenged the regulation's application as arbitrary and capricious, did not make any argument addressed to the degree of deference owed. *Id.* 632 at *16-23. Moreover, the regulation at issue, 29 C.F.R. § 541.118(a) (1996), defined the term "salary basis," which was used in the general regulations not in the Act, 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996), and was thus entitled to heightened deference as the agency's construction of its own regulation as this Court explained. *Auer*, 519 U.S. at 456. Thus, this Court's statement about § 541.118 must be regarded either as *dicta* or as based on the deference due the regulation as a construction of DOL's own, definitional regulation.[40]

Petitioners' other arguments are equally unconvincing. They argue that DOL promulgated the entire set of regulations, including the third-party regulation, pursuant to both its

---

were promulgated without notice and comment. But this is not the rationale of the cited cases and is incorrect. *See* 28 Fed.Reg. 7002 (1963) (proposed rules); 29 Fed.Reg. 9505 (1963) (final rules). *See also* 19 Fed.Reg. 1321 (1954) (proposed revision to one of the interpretive rules); 19 Fed.Reg. 4405 (1954) (final rule).

[40] Petitioners at 29 quote from a footnote of the Brief of the United States arguing for deference regardless of the regulation's classification as an interpretation, but fail to quote the remainder of the argument: "an agency's 'power authoritatively to interpret its own regulations is a component of [its] delegated lawmaking powers.'" 1996 U.S.S.Ct. Briefs LEXIS 647 at 31 n. 4. Thus, even assuming this Court accepted the government's argument, the basis of the deference it accorded the regulation is ambiguous.

authority under § 213(a)(15) to "define[] and delimit[]" the terms of the exemption and the general grant of rule-making authority. But while § 213(a)(15) was listed as authority for the entire set of final regulations (along with the general grant), *see* 40 Fed. Reg. 7405 (1975), DOL, in two separate statements, expressly indicated that the third-party regulation was not among those adopted pursuant to its authority to "define[] and delimit[]" the terms of the exemption. *See* 29 C.F.R. § 552.2(c); 39 Fed. Reg. 35382 (1974). Moreover, the notice does not specifically cite the authority given DOL in § 213(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites § 213(a)(15) as a whole. Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 384 (1985). Thus, merely citing the exemption without referring to the authority to "define[] and delimit[]" its terms does not at all suggest that the rule was an exercise of delegated law making authority.

Petitioners also argue that the "nature of the rule" suggests it is legislative, citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). But viewed as a whole, the "Interpretations" contained in subpart B do not read like laws. *See supra* at 38 n. 37. Moreover, *Chrysler* did not involve the question of the degree of deference due agency regulations (but rather the question of whether action authorized by a regulation was "authorized by law" as that term is used in 18 U.S.C. § 1905), and *Chrysler* was decided prior to *Mead* and *Chevron*. *Chrysler* cannot stand for the categorical proposition asserted by Petitioners or it would render the subsequent *Mead* test inoperable in many cases. Finally, *Chrysler* makes clear that the bare fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.'" *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that DOL did not "root" its actions in such a grant of power.

Petitioners' final argument is that the Second Circuit should have deferred to the DOL's *ex post facto* characterization of the regulation in its December 2005 Advisory Memorandum.[41] But the Second Circuit correctly did not accept the Memorandum's untimely characterization for three reasons.

First, it is DOL's classification of the regulation contemporaneous with its promulgation that is relevant under *Mead*, not its *post-hoc* reclassification three decades later in the Memorandum.[42] *Mead* holds that *Chevron* deference is not appropriate "where such authority [to adopt rules with force of law] was not invoked" – *i.e.*, invoked at the time of promulgation. 533 U.S. at 237 (emphasis added). That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Indeed, even prior to *Mead*, scholars of administrative law stated, "When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice*." Asimow, *Nonlegislative Rulemaking*, at 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n.40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but . . . . we are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")[43]

---

[41] Petitioners do not argue that such deference is required in this regard because DOL construed the terms of its own third-party regulation in the Memorandum and, in fact, the Memorandum does not in any way do so.

[42] In fact, the Memorandum does not characterize the *promulgation* of the regulation as an exercise of DOL's delegated law-making authority, but merely states, "the Department has always treated the third party employment regulations as legally binding legislative rules." P.A. 64a.

[43] While Professor Asimow's article and *Levesque's* holding concern the APA, their logic applies equally here.

Second, in *Auer*, this Court made clear that "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. 519 U.S. at 462 (quoting *Bowen*, 488 U.S. at 212). That is exactly what the Memorandum is as demonstrated by the timing of its issuance. On June 6, 2005, after the original petition for a writ of certiorari was filed in this case, this Court invited the Acting Solicitor General to file a brief. On December 1, 2005, DOL issued the Memorandum.[44] On December 22, 2005, the Solicitor General filed his Brief, relying primarily on the Memorandum as grounds for remand.[45] The Memorandum is "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."

Third, the Advisory Memorandum is, as its title makes clear, only advisory. It states expressly that it is intended only for *internal* guidance of agency personnel: "to advise staff how to apply the Section 13(a)(15) companionship services exemption . . . ." P.A. 50a. Indeed, only staff "outside the Second Circuit" are "instructed to continue to apply the exemption" to employees of third parties. P.A. 50a. This limitation on the intended effect of the Memorandum is consistent with DOL policy which provides: "advisory interpretations announced by the Administrator [this one was

---

[44] Even the vehicle of an advisory memorandum was invented to serve strategic interests in this case. DOL ordinarily provides advice through Wage and Hour Opinion Letters. *See, e.g., supra* at 12, 33. The fact that DOL rarely issues advisory memoranda is evidenced by the fact that this was the first one issued in 2005 even though it was issued on December 1. Moreover, a LEXIS search of all federal court decisions citing DOL advisory memoranda reveals only decisions citing the December 1, 2005 Memorandum.

[45] Justice Scalia's concerns are apt under these facts. "[E]ven if we allow deference to an agency view first expressed in pending litigation . . . surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position first expressed at the certiorari stage. The United States is the most frequent, and hence the most calculating, of our litigants." *Stutson v. United States*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting).

announced by the Deputy Administrator] serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1. Thus, the Memorandum expressly disclaims any influence on courts.

B. Notice and Comment Is Not Determinative

Petitioners argue that *Chevron* deference is *always* owed agency interpretations embodied in regulations adopted after notice and comment, while conceding that *Mead* held no such thing. *See Mead*, 533 U.S. at 230-31. As this Court pointed out in *Barnhart*, 535 U.S. at 222, much of the "discussion . . . [in *Mead*] would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive."

No Justice of this Court and no Court of Appeals has ever suggested that a regulation adopted after notice and comment is *always* entitled to *Chevron* deference, even when the agency clearly indicated at the time of adoption that it was not invoking its "delegate[d] general authority to make rules with force of law."[46] Surely an agency can decide to adopt an interpretation without exercising its delegated authority to "make rules with force of law" (in order, for example, to permit greater leeway for judicial construction), but do so after notice and comment.[47] In fact, this Court stated in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390 (1999), that even if an agency used notice-and-comment rulemaking a court may hold that the regulations "were not intended to be entitled to judicial deference" based on "language to this effect in the regulations

[46] Petitioners' cite Justice Scalia's reading of *Mead* in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1015 (2005) (Scalia, J., dissenting), as holding that "some unspecified degree of formal process was required – or was at least the only safe harbor." But that statement does not suggest that notice and comment requires *Chevron* deference even when the agency expressly declines to dock in the harbor.

[47] As this Court held in *Chrysler*, 441 U.S. at 312-13, "It is within an agency's discretion to afford parties more procedure."

themselves." There is precisely such language in § 552.2(c) of the regulations here.

C. The Notice and Comment Procedure Was Defective

Even if this Court were to hold that the use of notice and comment procedure is ordinarily determinative of a regulation's status under *Chevron* (regardless of the agency's contemporaneous intention), the Second Circuit found that DOL's compliance with the APA's notice and comment requirements "was at best idiosyncratic and at worst insufficient" when it promulgated the third-party regulation. P.A. 24a. This Court has held that a defect in mandated procedures precludes deference. *Chrysler* holds that "a procedural defect in the . . . regulations [– "lack of strict compliance with the APA" –]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312. *See also Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 242 (2004) (regulation "'is binding in the courts unless procedurally defective . . . .'")

Indeed, if the regulation is legislative, as Petitioners contend, the defect in notice renders it invalid under the APA. As the D.C. Circuit held, "[w]hatever a 'logical outgrowth' of [a] proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C.Cir. 2005). The Second Circuit similarly held, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). This was the case here.[48]

---

[48] The Solicitor General asserts that this argument was not timely raised in the District Court, but the issue was properly considered by the Second Circuit both because the Court has discretion to reach a purely legal issue not raised below when there is no prejudice, *see Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996), and

On October 1, 1974, DOL published the proposed regulation providing, "Employees who are engaged in providing babysitting and companionship services and who are employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise." 39 Fed. Reg. 35385 (1974). DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*

The notice of final rule making replaced the proposed regulation with its inverse – the current regulation. 40 Fed. Reg. 7404 (1975). DOL noted the change, but provided an explanation inconsistent with the text of the Act:

> The one major change in Part 552 is in § 552.109 which deals with 'third party employment.' This section as originally proposed would not have allowed the section 13(a)(15) . . . exemption for employees, who, although providing companionship . . . are employed by an employer or agency other than the family or household using their services. On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services.

40 Fed. Reg. 7404 (1975). This explanation neither addresses the logic of the proposal nor accurately reflects the full text of the exemption.[49] The exemption does not apply to "any

---

because the issue was raised in Plaintiff's Supplemental Memorandum in Opposition to Motion for Judgment on the Pleadings (Docket No. 24) at 10-11 and Defendants filed their Supplemental Memorandum of Law (Docket No. 26) after Plaintiff's filing. Moreover, as Defendants filed *no* brief in the Court of Appeals, they and their amici are not in a position to argue waiver.

[49] Moreover, it applies equally to babysitting services which were nevertheless treated differently as explained *infra* at 48-49.

employee engaged in companionship services" as DOL suggested, but rather only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). As the Second Circuit found, "the DOL ignored the plain language of the statute." P.A. 31a. By leaving out the critical limiting term "domestic service employment" – DOL improperly broadened the scope of the limitation on the extension of coverage beyond the scope of the extension itself. The defective notice thus led directly to a flaw in the agency's decision-making process.[50]

In *Chevron*, this Court held that deference is due if "the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865. Here, however, the decision was neither detailed nor reasoned and did not reconcile conflicting policies but rather was based on a misstatement of the statutory text. This Court has held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). The "relevant data" surely includes *all* the relevant statutory text.

III. GRANTED THE DEFERENCE IT IS DUE UNDER *SKIDMORE*, THE THIRD PARTY REGULATION SHOULD NOT BE FOLLOWED

In declining to follow the third-party regulation, the Second Circuit properly considered the regulation's "power to persuade" based on its consistency with the Act's text, its "consisten[cy] with the congressional purpose," its consistency with other regulations, the "consistency of the agency's position" over time, the "thoroughness evident in its consideration," and "the validity of its reasoning." *Skidmore*,

---

[50] DOL further stated, "This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions," 40 Fed. Reg. 7405, but did not specify what those were. The Solicitor General's effort to suggest what they might have been (at 19) is wholly unsuccessful as none of the provisions he cites contained parallel language relating to a type of "employment."

323 U.S. at 140; *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Batterton*, 432 U.S. at 425 n.9. We have demonstrated that the regulation is inconsistent with the text of the Act, with congressional intent, with two other DOL regulations, and with numerous DOL Opinion Letters. In addition, the regulation is inconsistent with that governing the paired exemption of babysitters, DOL has twice explained why the regulation is inconsistent with congressional intent, and the regulation defies this Court's command narrowly to construe exemptions in the FLSA.

A. The Regulation Is Inconsistent With That Governing The Paired Exemption Of Babysitters

DOL's regulations provide that babysitters employed by third-party firms are *not* included within the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the statutory exemption pairs employees employed "in domestic service employment to provide babysitting services or . . . companionship services" and the two types of domestic service employment were talked about in the same breath in Congress. In fact, Senator Williams defined companionship services by expressly likening it to babysitting. During floor debate, Senator Williams explained:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for – to watch the youngsters. 'Companion,' as we mean it, is in the same role – to be there and to watch an older person, in a sense.

119 Cong. Rec. 24801 (1973). Thereupon, Senator Burdick interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

There is no basis for treating companions employed by third parties differently from babysitters employed by third

parties as the proposed regulation of 1974 recognized.[51] Thus, DOL's regulations are internally inconsistent on this point, too.

B. DOL Has Twice Persuasively Explained Why Companions Employed By Third-Party Firms Are Not Exempt

We described *supra* at 46 how the DOL explained in 1974 why exempting employees of third-party firms was inconsistent with congressional intent. Again in 2001, DOL proposed reversing the third-party regulation and again persuasively explained why the current regulation is inconsistent with congressional intent. 66 Fed. Reg. 5485, 5488 (2001). "The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual babysitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member." *Id.* at 5485. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." P.A. 28a.

Petitioners point out that a proposed regulation is not a final regulation and, even if it were, that agencies do not necessarily sacrifice deference when they alter their construction of a statute. However, when it issued the 1974 and 2001 proposals to deny the exemption to both babysitters and companions employed by third-party firms, DOL explained why that was required by the Act and congressional intent. Notably, however, neither in its final regulations in 1975 nor in the withdrawal of the proposal in 2002 did DOL repudiate its earlier rationales or otherwise provide an adequate explanation of why it did not adopt the proposed regulations as final. According to this

[51] Petitioners will argue that the statutory exemption of babysitters, unlike that for companions, is qualified by the words "on a casual basis." *See* 29 U.S.C. § 213(a)(15). But DOL's regulations define the term "on a casual basis" separate and apart from the third-party regulations. *Compare* 29 C.F.R. § 552.104 *with* § 552.109(b).

Court, "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). This Court has specifically cited an agency's "lack of specific attention to . . . statutory authorization" as "especially important" in declining deference because "the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade.'" *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287, n. 5 (1978). In both instances here, the proposals were supported by valid and consistent reasoning that considered the full statutory text while the final agency actions were not so supported.[52]

C. The Third-Party Regulation Is Inconsistent With The Required Narrow Construction Of FLSA Exemptions

The third-party regulation, allowing business firms to pay their employees less than the minimum wage and no additional compensation for overtime for the physically and emotionally demanding work of caring for elderly and infirm people in their homes, conflicts, finally, with this Court's repeated command that "[a]ny exemption from such humanitarian and remedial legislation must be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and sprit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

The third-party regulation is unpersuasive under *Skidmore*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

---

[52] Petitioners cite the age of the regulation as grounds for deference but it is shaky grounds when the most contemporaneous construction was rejected on faulty grounds and, in any event, "[a] regulation's age is no antidote to clear inconsistency with a statute." *Brown*, 513 U.S. at 122.

Respectfully submitted,

MICHAEL SHEN
225 Broadway
Suite 2515
New York, NY 10007
(212) 227-0300

HAROLD CRAIG BECKER*
25 E. Washington St.
Suite 1400
Chicago, IL 60602
(312) 236-4584

* *Counsel of Record*